81-18

No.

Office-Supreme Court, U.S.
FILED
JUL 3 1981
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PERRY EDWARD WOOLRIDGE - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY
AND
APPENDIX

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July 3, 1981

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QUESTIONS PRESENTED

1. Is it a violation of a defendant's Sixth Amendment right to a fair and impartial trial where a trial court, in a state in which the jury fixes the punishment, instead of sending the jury back for further deliberation, accepts and reforms a verdict in open court which is unintelligible and impossible to interpret as to the amount of punishment to be prescribed.

2. Whether Petitioner was denied his Fourteenth Amendment right to due process of law and his Sixth Amendment right to trial by a fair and impartial jury when the prosecuting attorney made comments to the jury based on facts not contained in the record and intentionally made incorrect interpretations of facts contained in the record.

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

PERRY EDWARD WOOLRIDGE - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY AND APPENDIX

The Petitioner, PERRY EDWARD WOOLRIDGE, respectfully prays that a Writ of Certiorari issue to review the Memorandum Opinion of the Supreme Court of Kentucky entered in this proceeding on March 10, 1981.

OPINION BELOW

The opinion of the Supreme Court of Kentucky was not published. A Petition for Rehearing was filed and the Supreme Court of Kentucky was ordered to respond. The Order of the Supreme Court of Kentucky overruling Petitioner's Petition for Rehearing was entered on May 5, 1981. (Appendix B, p. 29.)

JURISDICTION

The Memorandum Opinion of the Supreme Court of Kentucky affirming the Petitioner's conviction was entered on March 10, 1981, and a timely Petition for

Rehearing was denied by Order of the Supreme Court of Kentucky on May 5, 1981. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> . . . [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . . .

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

This case was tried by a jury in the Jefferson Circuit Court on January 9th, and 10th, 1980. The Petitioner was charged with murder for the shooting death

of one, Bill Olive. The jury found the Petitioner guilty of manslaughter.

The Petitioner perfected a timely appeal to the Supreme Court of Kentucky. Petitioner alleged, among other errors, the following prejudical rulings of the Trial Court which form the basis of this Writ of Certiorari. First, the Petitioner alleged that he was denied his Sixth Amendment right to a fair and impartial trial when the jury failed to fix the prescribed amount of punishment in their verdict and the Trial Court instead of sending the jury back for more deliberation decided to accept and reform the verdict in open court.[1]

Secondly, Petitioner alleged that he was denied his right to due process of law and his Sixth Amendment right to trial by a fair and impartial jury when the prosecuting attorney presented the jury with facts not contained in the record. The prosecuting attorney told the jury that the deceased and the Petitioner were partners in business in an effort to establish a motive for the murder when, in fact, there was absolutely no evidence in the record which would have supported such a farfetched deduction by the prosecutor. To the contrary, all of the evidence in the record demonstrated that the relationship between the Petitioner and the

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[1]In Kentucky, the jury's duty to fix the punishment for an offense is governed by R.Cr. 9.84 which provides that when the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it should be fixed by the court.

deceased was one of lessor and lessee and not partnership.

In its decision rendered on March 10, 1981, the Kentucky Supreme Court held that the action of the Trial Court in reforming the verdict in open court simply made the verdict conform to the intention of the jury. [Appendix A, p. 27.] The Court also held that any prejudice arriving from the inflammatory remarks made by the prosecuting attorney was nullified since the Trial Court had admonished the jury not to consider said comments. [Appendix A, p. 27.]

The Petitioner then filed a timely Petition for Rehearing which was denied on May 5, 1981. Petitioner filed a Motion to Recall the Mandate pending consideration by this Court of the within Petition. Said Motion was sustained on May 20, 1981.

REASONS FOR GRANTING THE WRIT

I. It Is a Fundamental Violation of a Defendant's Sixth Amendment Right to a Fair Trial, Where, in a State in Which the Jury Fixes the Sentence, the Trial Court, Instead of Sending the Jury Back for Further Deliberation, Accepts and Reforms a Verdict in Open Court That Is Patently Unintelligible and Impossible to Interpret as to the Specific Punishment Intended To Be Imposed.

In Kentucky, the jury's duty to fix the punishment for an offense against the state is governed by R. Cr. 9.84 which provides in relevant part as follows:

> (1) When the jury returns a verdict of guilty it shall fix the degree of the offense and the

> penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court.

This procedural rule plainly imposes a requirement that in a verdict of guilty, the jury must fix a specific penalty.

> This procedural rule plainly imposes a requirement that in a verdict of guilty the jury should have fixed a specific penalty in the present case. It is apparent that the verdict returned by this jury was incomplete under the expressed standard stated in the procedural rule. *Holcomb* v. *Commonwealth,* Ky., 501 S. W. 2d 264 (1973).

Petitioner submits that he was denied his Sixth Amendment right to a fair trial when the jury brought back a verdict that failed to fix the Petitioner's punishment as mandated by R. Cr. 9.84 and the Trial Court, instead of sending the jury back for further deliberation, reformed and accepted this unintelligible verdict in open court.

The Trial Court became aware of the defective verdict when the jury, after deliberating for almost three hours, returned to the courtroom and found the Petitioner guilty of manslaughter. As the foreman of the jury read the verdict it became readily apparent that the jury had failed to designate a specific punishment for its verdict finding the Petitioner guity of manslaughter. The jury had erroneously fixed the punishment at confinement in the penitentiary for not less than 10 or more than 20 years.

Court: Did the Jury reach a verdict?

Mr. Allmond: Yes, sir.

Court: Would you read the verdict, please, that the Jury reached?

Mr. Allmond: *The verdict of this Jury is that the defendant will be charged on Instruction No. 2, Manslaughter, for not less than 10 or more than 20 years.* [T.E. Vol. IV, p. 356]

Obviously this verdict was fatally defective since it failed to specifically designate the amount of punishment intended to be imposd as required by R. Cr. 9.84.

When asked for a clarification of this incomplete verdict, the foreman responded that he did not understand.

Court: Well, you said 10 to 20 years, but I need to know what the verdict was exactly.

Mr. Allmond: I don't quite understand, Your Honor. [T.E. Vol. IV, p. 357]

It is clear that the foreman and the jury were confused as to their duty to prescribe a specific amount of punishment. In fact, the testimony of Mr. Allmond, the foreman of the jury, demonstrates that the jury had deliberated under the erroneous conception that they were without authority to prescribe any punishment.

Sheriff: How many years, sir?

Mr. Allmond: Oh. That was the charge. *Isn't that all we're allowed to give, is the charge?* We recommended the maximum.

Court: Well, that's what I need to know.

Mr. Allmond: Okay. We recommended 20 years.

Court: You recommended 20 years?

Mr. Allmond: Yes, sir. [T.E. Vol. IV, p. 357]

In short, the jury failed to prescribe a definite punishment because they thought that their authority was limited to bringing back a charge of either guilty or not guilty.

The foreman's confusion and misunderstanding of the jury's duty to prescribe a punishment is evidenced by the following colloquy:

Court: Let me see the verdict, please.

(At this time the verdict was given to the Court.)

Court: Mr. Allmond, *there's still some problem.* The verdict reads: "We the Jury find the defendant, Perry Edward Woolridge, guilty under Instruction No. 2 and recommend a punishment at confinement in the penitentiary for not less than 10 nor more than 20 years. And it's incumbent upon the Jury, as the Instructions read, to fill in the blank with the number of years that the Jury recommends, within that range of the 10 to 20 years, if that's your verdict.

Mr. Allmond: That's our verdict. [T.E. Vol. IV, pp. 357-358]

In other words, even after the foreman had just contended that the jury had recommended the maximum sentence, he once again stated the opposite posi-

tion that the jury's verdict was that the Petitioner be imprisoned in the penitentiary for not less than (10) years and not more than twenty (20) years.

It is all too clear that the jury had failed to deliberate on and assess a specific punishment for the Petitioner. In *Holcomb, supra,* the Supreme Court of Kentucky adopted language from C.J.S. for the proposition that a verdict which omits the punishment provision is fatally defective.

23A C.J.S. Criminal Law §1408, page 1106, states:

> "Where the jury fails to assess the punishment pursuant to statutory mandate, the verdict will not sustain a judgment, and the court should decline to receive the verdict. Where a statute requires that a verdict of guilty of a specified offense shall assess a term of imprisonment as part of the punishment, a verdict omitting such provision is fatally defective." *Id.,* at p. 264.

Thus, the jury's verdict in the instant case was fatally defective since it had prescribed no specific punishment.

The United States Court of Appeals for the Third Circuit has held that a verdict must be unqualified and unambiguous. Furthermore, a trial court may not accept a defective verdict but must either direct the jury to retire for future deliberation or declare a mistrial.

> In a federal criminal trial, a verdict must be unqualified and unambiguous. It must represent the unanimous vote of the jurors. *A trial court may not accept a verdict if it is defective but must either direct the jury to retire for further deliberation or declare a mistrial.*

[Emphasis Added] *United States* v. *Lee*, 532 F. 2d 911, 913 (Third Circuit 1976)

Kentucky caselaw is consistent with the above rule that a Trial Court is duty bound to either send the jury back to reform a verdict or declare a mis-trial when it is obvious that a verdict is patently unintelligible. See *Bogie* v. *Commonwealth*, Ky., 467 S. W. 2d 767, 769 (1971) and *Meader* v. *Commonwealth*, Ky., 363 S. W. 2d 219, 221, 222 (1963).

In *Wright* v. *Commonwealth*, Ky., 455 S. W. 2d 561 (1970), a case strikingly analogous to the instant case, the Supreme Court of Kentucky acknowledged that the correct procedure to be employed by the Trial Court, when a jury returns a defective verdict, is to send the jury back to the jury room to correct its verdict. In *Wright* the jury found the defendant guilty on two counts and erroneously fixed his punishment at ten (10) years when the instructions clearly mandated that his punishment had to be fixed at twenty years (20) for a conviction on two counts. The trial judge then asked the foreman if it was the jury's intention to give ten (10) or twenty (20) years. When the foreman replied twenty (20) years, the trial judge very wisely directed the jury to go back to the jury room and write out the correct verdict as to their intention.

> *"Now, ladies and gentlemen of the jury, is it your intention to give the defendant ten years or twenty years?"* The foreman replied: *"Your Honor, we meant for it to be twenty years* * * *

> So we figure that the Court considered twenty years." The judge then directed the jury: *"Go back with the Sheriff, and write out your verdict at to your intention".* The jury did so, and returned a new verdict fixing the punishment at a term of 20 years. *Since the verdict did not conform to the instructions, it was entirely proper for the judge to direct the jury to retire and return a correct verdict. Id.,* at 562.

Although this Court has never specifically ruled on this issue, it is clear that when a trial judge cannot determine from the written verdict, the jury's intention as to the amount of punishment, the proper procedure mandates that the judge should instruct the jury to retire to the jury room and correct their verdict by writing out their intention.

Instead of following the correct procedure and directing the jury to retire and correct its defective verdict, the Trial Court told the jury in open court that the punishment had to be "10 years, 11 years, 12 years, 13 years, 14 years, something within that range."

> Court: No, but I mean if you found the defendant guilty under Instruction No. 2 then it's incumbent to narrow it down to somewhere between the 10 and 20 years. Ten to 20 years is not sufficient. It's got to be 10 years, 11 years, 12 years, 13 years, 14 years, something within that range. [T.E. Vol. IV, p. 358]

The Court's procedure was highly prejudicial since it placed the trial judge in a position to act as a thirteenth juror. By conducting questioning in open court, the

trial judge was, in effect, attempting to indirectly persuade and pressure the foreman into prescribing a specific punishment for the Petitioner.

As if the pressure emanating from the bench in open court were not enough, the sheriff decided to get into the act, so to speak, and apply his own subtle persuasion. When the confused foreman told the trial judge that he didn't understand, the sheriff demanded the foreman to designate a specific number of years of punishment for the Petitioner.

> Mr. Allmond: I don't quite understand your honor.
>
> Sheriff: How many years, sir? [T.E. Vol. IV, p. 357]

Petitioner submits that the foreman's statement, that the jury recommended the maximum sentence, really came as no surprise in light of the subtle pressures being directly and indirectly applied in open court by the sheriff and the trial judge. The foreman really had only two options: (1) Look like a fool in open court by admitting that he did not understand the jury's duty to prescribe punishment; (2) Recommend a punishment which he thought the rest of the jurors would agree with and, thereby, eliminate the pressure and the possibility of looking like a fool in open court. Petitioner submits that in light of the total circumstances outlined above, the foreman's choice #2, to recommend the maximum sentence, really came as no surprise.

It also came as no surprise that the remaining jurors, when polled in open court as to their intention, all agreed with the foreman's recommendation of the maximum sentence. By simply following the leader, the juriors found an avenue of escape from the pressure and possibility of embarassment in open court.

It would have been very easy for the Trial Court to have followed the correct procedure of instructing the jury to retire and write out their intentions. It seems that the Court was more interested in expediting the conclusion of the trial, instead of ensuring that the Petitioner, at such a critical stage of the trial, received the correct punishment for the crime.

It is axiomatic that neither a judge nor anyone else can invade the secret province of the jury. This fundamental principle ensures that a defendant will be judged impartially by twelve of his peers who deliberate independently and are absolutely shielded from any direct or indirect pressures which might influence their judgment.

Petitioner submits that the Trial Court in the instant case invaded the secret province of the jury by forcing the jury to correct its defective verdict in open court. It is clear from the testimony of the foreman that the jury had never discussed the amount of punishment to be prescribed since they had deliberated under the erroneous conception that their authority was limited to bringing back a charge of either guilty or not guilty. By forcing the jury to designate a specific punishment in open court, the Trial Court invaded the secret province of the jury and, hence, vio-

lated the Petitioner's right to a fair and impartial trial as guaranteed by the Sixth Amendment.

II. The Petitioner Was Denied His Fourteenth Amendment Right to Due Process of Law and His Sixth Amendment Right to Trial by a Fair and Impartial Jury When the Prosecuting Attorney Made Comments to the Jury Based on Facts Not Contained in the Record and Intentionally Made Incorrect Interpretations of Facts Contained in the Record.

During closing argument, the Commonwealth of Kentucky's Prosecuting Attorney, John Stewart, made several remarks which effectively denied PERRY EDWARD WOOLRIDGE his Sixth Amendment right to a fair trial by an impartial jury of his peers. Prior to the Commonwealth Attorney's closing argument, all of the evidence adduced at trial established conclusively that the Petitioner was the sole owner of a business known as Perry's Liquors, located at Twenty-sixth Street and Broadway in Louisville, Kentucky. The Petitioner testified upon direct examination that he had purchased the business in late 1976 or early 1977. [T.E. Vol. III, p. 263]

As a personal favor to the previous owner, the Petitioner agreed to allow the deceased to remain on a portion of the premises and sell beer, since it was the Petitioner's intention to convert the bulk of the property into a liquor store. The Petitioner allowed the deceased to sell beer on the premises as long as he

paid his rent pursuant to a "Gentlemen's Agreement." [T.E. Vol. III, pp. 264-265]

Detective Johnson of the Louisville Police Department stated that the police clearly knew, from talking to witnesses, that the deceased merely rented space from the Petitioner.

> Johnson: He refused to decline any connection with business with the victim and *we know from the witnesses that the victim rented*-- [T.E. Vol. I, p. 52]

Detective Pat Sowers further testified that James Woolridge, an employee of Perry's Liquors, had told him that the deceased leased the back of the building pursuant to a verbal agreement.

> Mr. Stewart: Now, did he give you any information regarding the existence of a lock on the door?
>
> Mr. Sowers: Yes, sir, he did.
>
> Mr. Stewart: And what did he tell you at that time?
>
> Mr. Sowers: *He stated that Bill Olive leased the back of the building but this was only a verbal agreement* and that Perry had placed the lock on the Twenty-seventh Street side of the business so Bill Olive could not enter. [T.E. Vol. III, p. 240]

James Lewis, an employee of the deceased, stated that the deceased had never owned any of the building located at Twenty-sixth Street and Broadway and that the decedent only had a lease agreement to sell beer on a portion of the premises.

Mr. Stewart: From your own personal knowledge, did Mr. Olive have his beer depot operating under another owner?

Mr. Lewis: *Well, as far as I know, I understood he had it leased.*

Mr. Stewart: From your own personal knowledge did he have a lease at the time Mr. Woolridge bought it?

Mr. Lewis: *Yes, he had that lease then.*

Mr. Stewart: And when did you start working for him, after the Defendant bought the building or before?

Mr. Lewis: I think I started afterwards. [T.E. Vol. II, pp. 134-135]

The Petitioner's testimony clearly indicates a lessor-lessee relationship since it establishes that the deceased was one month behind in his rent.

Mr. Curtis: When was the last time Mr. Olive had paid that overhead?

Perry Woolridge: Approximately two months. It had elapsed two months. It was about two—I would say three months on the light and gas, *and as far as far as the rental fee he was just one month behind—I mean, it was coming up. It should have been in, but the month before — he hadn't paid the month before that.* I was out of town a lot and usually the way he does it, he gives it to me. [T.E. Vol. III, p. 306]

The Petitioner submits that all of the above testimony can only indicate that the deceased merely rented space from the Petitioner. There is an absolute lack

of evidence which would support a conclusion that the Petitioner and the deceased's relationship was something other than that of lessor and lessee.

However, in his closing argument, the Commonwealth's Attorney chose to ignore all of the above testimony and, instead, he created and presented his own version of the facts. The Prosecutor told the jury that the Petitioner had no right to put a lock on the door since he and the deceased were involved in a partnership agreement.

> Mr. Stewart: It is well known that a man's word is his bond and that there was a Gentlemen's Agreement between the victim and the defendant regarding the business arrangement of the depot. What right did the defendant have to call a halt to the deal? It was a Gentlemen's Agreement, an agreement which is a mutual agreement which can only be broken by the mutual consents. A Gentlemen's Agreement. *What right, if any, did the defendant have to put a lock on the door of a business wihch is owned by his partner.* [T.E. Vol. IV, pp. 352-353]

Defense counsel properly objected and asked the Court to admonish the jury that the word "partnership" had never been mentioned in any of the testimony adduced at trial. The Trial Court recognized the fact that there had been no testimony regarding partnerships but chose not to admonish the jury. [T.E. Vol. IV, p. 353] It was error in this instance for the Prosecutor to inject any mention of a partnership between Woolridge and

Olive because he was keenly aware that such a partnership did not exist.

The only purpose served by the inclusion of such comment was to give the jury an unfair and untrue impression that the alleged "partnership" was the root of the problem between the actors in this incident. Such comment also planted in the minds of the jurors a false motive for the shooting and gave the jury the impression that the killing of the deceased was premeditated, which it was not.

It is an old and well-settled rule of law that a conviction gained by testimony which gives the jury a false impression is obnoxious to the precepts of Due Process of Law. See *Alcorta* v. *Texas*, 355 U. S. 28, 2 L. Ed. 2d 9 (1957). The rule of *Alcorta* regarding the use of false evidence also applies where the state, although not soliciting false evidence, allows false evidence to go uncorrected when it appears.

> *First*, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. [Citations omitted.] The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [Citations omitted.]
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness

may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N. Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N. E. 2d 853, 854, 855.

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.* . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." [Emphasis added.] *Napue* v. *Illinois*, 360 U. S. 264, 269, 270 (1959).

The violation of the rules of *Alcorta* and *Napue* in the instant case is clear. While numerous witnesses testified that the Petitioner and the decedent operated independent enterprises pursuant to a "Gentlemen's Agreement," the Prosecutor injected comments regarding the "partnership" of Petitioner Woolridge and Olive, comments that the Prosecutor knew were patently false and not based on the evidence presented. These improper comments indelibly placed in the minds of the jurors the inaccurate and unwarranted inference that the Petitioner had a motive for killing

Bill Olive. In short, the prosecutor was attempting to show that the Petitioner stood in a position to enjoy financial gain from the death of the decedent through insurance proceeds or a complete takeover of the business as a result of the fictitious "partnership" status.

Petitioner submits that the magnitude of the due process violation in this case is much greater than the violations in *Alcorta* or *Napue*. In those cases, the witnesses were actually the perpetrators of false evidence while the Prosecutors simply acquiesced or neglected to correct such false testimony. In the instant case, witness after witness testified truthfully and accurately as to the lessor-lessee relationship of the parties, yet the Prosecutor repeatedly injected comments as to the "partnership" of the parties. In essence, the false evidence originated from the Prosecutor and not the witness stand. Instead of relying on the facts contained in the record, the Prosecutor literally made up his own set of facts and argued them to the jury.

In addition to the contrived facts outlined above, the prosecutor also stated before the jury that the eyewitnesses to the crime were biased toward the Petitioner, because they would lose their jobs if he was convicted of a felony. In other words, the Prosecutor planted in the minds of the jurors the false belief that the Petitioner's liquor license would be automatically revoked if he were convicted of a felony.

> Mr. Stewart: Yes, I called them, but you got to look at the relationship that they have with the

victim—with the defendant. One is a guy unemployed, not working, a shotgunner, comes in whenever he's needed. On the day in question he was down to Perry's Liquors to work.

Another witness, Robert Brisco, a friend of the defendant who was also down at Perry's Liquors that morning to help take inventory. *Sure they're going to tell you the best evidence which is favorable to the defendant. It's their money, and if this man is convicted today he looses his license, they lose a job*—[T.E. Vol. IV., pp. 347-348]

The above remarks highly prejudiced the rights of the Petitioner, mislead the jury, and constituted another violation of the rules of *Alcorta* and *Napue*. There is absolutely no evidence in the record which could substantiate or even remotely suggest that the Petitioner would automatically lose his liquor license if convicted of a felony.

Besides the fact that there was no evidence in the record to support this allegation, the Prosecutor's remark was totally untrue. K.R.S. 243.500 sets out the causes for which an alcoholic beverage license must be revoked or suspended. It is important to note that a conviction of manslaughter is not one of the causes listed under K.R.S. 243.500 which mandate that a liquor license be revoked. In short, the Prosecutor not only argued facts outside of the record but argued facts that were totally untrue as well.

Defense counsel objected to these highly improper remarks and moved the Court for a mistrial. The

Trial Court overruled the motion for mistrial and admonished the jury not to consider the Prosecutor's remarks in their deliberations. [T E. Vol. IV, p. 348] It is obvious that the Trial Court's admonition did not remove the irreversible prejudice that had been planted in the minds of the jurors but, rather, only served to compound the prejudice. The entire testimony from the only eyewitnesses to the shooting was now unjustly tainted in the minds of the jurors. *This single, blatantly false, remark from the prosecutor essentially stripped the Petitioner of his ability to receive a fair and impartial trial.* While the Petitioner will concede that the Prosecutor has the right to comment on biased interests, he may not do so by presenting facts to the jury that are outside of the record that are patently untrue, and based totally on conjecture.

The leading case relating to prosecutorial misconduct remains to be *Berger* v. *United States,* 295 U. S. 78 (1935). In *Berger,* this Court carefully defined the role of the prosecutor in the criminal justice system.

> As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Id.* at 88.

The Prosecutor's statements in the instant case represent no more than a calculated attempt to influence and mislead the jury and are clearly violative of the principles outlined by this Court in *Berger*. The Prosecutor struck foul blows by cleverly imparting to the jury that the Petitioner's motive for killing the deceased was that he would derive personal financial gain from their "partnership" through proceeds of an insurance policy or some other means. Furthermore, he planted in the minds of the jurors the erroneous conclusion that the Petitioner would automatically lose his liquor license if convicted of a felony. This remark was highly prejudicial for two reasons: (1) It simply was not true; (2) It erroneously led the jury to believe that the only eyewitnesses to the crime would testify favorably for the Petitioner since they would lose their jobs if he were convicted.

By presenting the jury with the above facts, which could not be substantiated by any evidence in the record, the Prosecutor struck foul blows and breached his duty as an officer of the Court. Therefore, it is in the interests of justice and fundamental fairness that this Court grant the Writ of Certiorari.

CONCLUSION

This Petitioner was denied his Sixth Amendment right to a fair trial and Fourteenth Amendment right to Due Process of Law when the Trial Court chose to accept and reform a verdict in open court which was patently unintelligible as to the amount of punishment intended to be imposed by the jury. The Petitioner's fundamental right to a fair and impartial trial was violated when the prosecutor presented facts to the jury that were not contained in the record and intentionally made incorrect interpretations of facts contained in the record. For the reasons hereinabove stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

RENDERED: MARCH 10, 1981
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

80-SC-385-MR

PERRY EDWARD WOOLRIDGE - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Richard A. Revell, Judge
No. 79-CR-0864

MEMORANDUM OPINION OF THE COURT AFFIRMING

Appellant, Perry Edward Woolridge, was indicted for murder in the shooting death of Bill Olive. A jury subsequently found him guilty of manslaughter in the first degree and he was sentenced to 20 years in prison. Woolridge brings this appeal as a matter of right.

In late 1976 or early 1977 appellant purchased a Louisville liquor supply depot known as Perry's Liquors. As a personal favor to the previous owner, appellant agreed to allow Bill Olive to remain on a portion of the premises and sell beer. The parties entered into an oral agreement under which Olive paid a monthly rent and shared in utility costs. Appellant reserved the right to terminate the agreement at any time.

After Olive was a month behind in his rent payments and two months behind in his share of the utility expenses,

appellant chose to sever their rental agreement. On the morning of March 3, 1979, appellant came to the premises and put a lock on the door to the part of the business used by Olive. Appellant and some employees began taking inventory of all stock so that Olive would be paid for anything belonging to him. Olive arrived a short time later angered by the locked door and termination of the agreement. He took a hammer and beat the lock off the door. Appellant shot and killed Olive when the latter came toward him swinging the hammer.

Appellant first argues that the evidence was insufficient to support his conviction. On the contrary 16 witnesses testified on behalf of the Commonwealth. Photographs, slides, and other demonstrative evidence was also introduced. A review of the record indicates that it was not unreasonable for the jury to find appellant guilty. *Trowel* v. *Commonwealth*, Ky., 550 S. W. 2d 530 (1977).

Appellant also contends that he was prejudiced by the testimony of Detective Jim Johnson. Johnson testified that appellant refused to answer certain questions about the business relationship with the deceased when he gave a statement to police officers. Appellant argues that his right to remain silent was violated. *Doyle* v. *Ohio*, 426 U. S. 610 (1976). *Doyle*, however, stands for the notion that the prosecution cannot comment on a defendant's silence when he is initially arrested and accused of a crime. Such is not the case here. Appellant chose not to answer questions about a collateral matter and not about the crime itself. This silence was part of a statement in which he had already admitted shooting the deceased.

Appellant further argues that he was denied a fair trial as a result of remarks made by the Commonwealth's Attorney during the opening and closing arguments. In the first instance the prosecutor read the indictment in which the possible sentences were listed as "Death or 20 years to life." Appellant alleges prejudice in that the parties

had earlier stipulated that the death penalty would not be sought. The prosecutor immediately corrected himself and stated the sentence as "20 years to life," thereby alleviating any error. Regarding the other allegedly inflammatory remarks, the record reflects that the jury was admonished not to consider the comments in reaching a verdict. Any prejudice therefore was nullified. *Stallings* v. *Commonwealth*, Ky., 556 S. W. 2d 4 (1977); *Hawkins* v. *Commonwealth*, Ky., 481 S. W. 2d 259 (1972).

The final argument surrounds the return and language of the verdict. When asked by the trial court to read the verdict, the foreman responded, "The verdict of this jury is that the defendant will be charged on Instruction No. 2, Manslaughter, for not less than 10 or more than 20 years." When asked for clarification of the sentence the foreman indicated that he did not understand. The trial court explained that the jury must recommend a specific term of years in its sentence. The foreman then stated, "Okay. We recommended 20 years." The judge then polled the jury individually in order to ascertain whether it was their unanimous recommendation that appellant receive a 20-year sentence. Each member said that this was the jury's recommended sentence. The action of the trial court simply made the verdict conform to the intention of the jury. *See Mathis* v. *Commonwealth*, Ky., 447 S. W. 2d 641 (1969).

The judgment is affirmed.

All concur.

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APPENDIX B

OPINION RENDERED: MARCH 10, 1981

SUPREME COURT OF KENTUCKY

PERRY WOOLRIDGE

v.

COMMONWEALTH OF KENTUCKY

File No. 80-SC-385-MR

Appeal From Jefferson Circuit Court
Action No. 79-CR-0864

MANDATE—Issued May 5, 1981

The Court being sufficiently advised delivered herein a memorandum opinion March 10, 1981.

It is therefore considered that the judgment of the Jefferson Circuit Court is affirmed; which is ordered to be certified to said court.

May 5, 1981. Appellant's petition for rehearing is denied.

John C. Scott, Clerk
(s) By R[illegible]e Tomlinson, D.C.